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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1466

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, ETC., ET AL.,
Petitioners.

vs.

MICHAEL L. SHAKMAN AND PAUL M. LURIE, ETC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

R. DICKEY HAMILTON,
ROBERT PLOTKIN,
208 South LaSalle Street,
Chicago, Illinois 60603,

C. RICHARD JOHNSON,
One First National Plaza,
Suite 4200,
Chicago, Illinois 60670,

ROGER R. FROSS,
135 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Respondents.

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INDEX.

PAGE

Statement of the Case 1

The Complaint 2

The District Court's Opinion 6

The Court of Appeals' Opinion 6

Argument 7

I. The Case Is Not Ripe for Review 7

II. The Decision of the Court of Appeals Imposes No Hatch Act Restrictions on Public Employees 7

III. There Is No Conflict of Decisions 8

IV. The Court of Appeals Did Not Err in Ruling That the Case Is Justiciable 9

Conclusion 11

CITATIONS.

Cases.

American Construction Co. v. Jacksonville R. R. Co., 148 U. S. 372 (1893) 7

Baker v. Carr, 369 U. S. 186 (1962) 11

Bond v. Floyd, 385 U. S. 116 (1966) 10

Brockington v. Rhodes, 396 U. S. 41 (1969) 5

Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. R. Co., 389 U. S. 327 (1967) 7

Cafeteria Workers v. McElroy, 367 U. S. 886 (1961) .. 9

Cramp v. Board of Public Instruction, 368 U. S. 278 (1961) 10

Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F. 2d 119 (8th Cir. 1968) 8, 9
Pickering v. Board of Education, 391 U. S. 563 (1968) 10
Shelton v. Tucker, 364 U. S. 479 (1960) 10
Wieman v. Updegraff, 344 U. S. 183 (1952) 10

Constitution.

First, Fifth and Fourteenth Amendments to Constitution of the United States 4

Statutes.

Sections 1983, 1985, 1986 and 1968, Title 42, United States Code 4

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STATEMENT OF THE CASE.

The complaint in this case was filed on October 17, 1969, in the United States District Court for the Northern District of Illinois. The complaint was dismissed without an evidentiary hearing by the District Court on November 6, 1969. That dismissal was reversed by the United States Court of Appeals for the Seventh Circuit on October 23, 1970, the case being remanded to the District Court for further proceedings. [The decision of the Court of Appeals is reported at 435 F. 2d 267 (7th Cir. 1970).] Petitions for

rehearing *in banc* were denied on December 18, 1970. The petition for a writ of certiorari seeks a review of the decision of the Court of Appeals remanding the case for further proceedings. The decision sought to be reviewed is, of course, not a final judgment; indeed, no evidentiary hearing has yet been held.

The Complaint.

Since the decision sought to be reviewed involves only the sufficiency of the complaint, it is important briefly to describe its allegations. The complaint is brought by respondent Michael L. Shakman, an independent candidate (not the candidate of any political party) for Delegate to the Illinois Constitutional Convention, and by respondent Paul M. Lurie, one of his supporters [4*, 26]. It is brought on behalf of the respondents and also as a class action on behalf of all present and future independent candidates for public office in Cook County, Illinois, as well as on behalf of classes of present and future voters and of taxpayers in Cook County [5, 26, 30]. The defendants (petitioners) are elected officials of the City of Chicago and Cook County, the Democratic County Central Committee of Cook County, officials and members of that Central Committee, the City of Chicago and a corporation known as The Democratic Organization of Cook County [5-8].

The complaint sets out six counts, all of which seek redress for deprivations of rights under the United States Constitution and the civil rights laws. One count is brought on behalf of respondent Shakman and other independent candidates for public office, including those in future elections; another count is brought on behalf of both respondents and others as voters, including those in future elections, and a third count is brought on behalf of respondents

* Unless otherwise indicated, page numbers refer to the Appendix for the Court of Appeals.

and others as taxpayers. As to each such claim, the complaint also adds in separate counts allegations that the defendants conspired to deprive plaintiffs of such rights [31-32].

Basically, the complaint alleges that many thousands of public employees are required, as a condition of obtaining and maintaining public employment, to give political support (including money and work) to the defendant partisan political organizations and officials or to their candidates for public office [11-15]. These employees are employed by the City of Chicago, the County of Cook and other state and local governmental entities in Cook County. The complaint alleges that the number of such public employees so coerced into giving such political support is between 8,000 and 30,000. It is impossible to state a more precise number, the complaint alleges, because of the concealment by the defendants and others allied with them of the facts concerning these employees [12]. Many of the jobs affected are of a clerical, ministerial or labor nature (such as truck drivers, office clerks, sewer workers, public health technicians, etc.) [12, 41, 58].

In specific, the complaint alleges that thousands of such employees are required as a condition of their public employment to contribute money (often a percentage of their wages) to defendant partisan political organizations and officials or to their candidates [13]. Also, thousands of such public employees are, it is alleged, required as a condition of their public employment to do active political campaigning in the precincts—door to door solicitation, putting up posters and the like—on behalf of the defendant political organizations and officials or their candidates [13]. These public employees are further required as a condition of such employment not to support candidates for public office opposed or not endorsed by the defendant political organizations and officials [15, 18].

The complaint still further alleges that many of such public employees are permitted and, indeed, required as a condition of their public employment to do partisan political work in support of candidates of the defendant partisan political organizations and officials on public time while being paid with public funds raised by taxation [14].

Such public employees who fail to do such political work for, or to contribute money to, the defendant partisan political organizations and officials or their candidates, or who give political support to independent candidates (such as plaintiff Shakman), are discharged from or demoted or otherwise punished in their public employment by defendants [18]. Moreover, persons who fail to give or to promise to give such political support or who fail to receive the "sponsorship" of defendant political organization officials or some other politically influential persons connected with such organizations are excluded from such public employment positions [12].

The complaint describes in detail how these public employment practices perpetrated by defendants serve to violate the constitutional rights of independent candidates for public office [19-23]. The complaint also describes how the practices violate the constitutional rights of plaintiffs, and the classes they represent, as voters and as taxpayers [19-23]. In sum, the public employment practices described in the complaint operate to create an army of political workers and a giant political treasury, all paid for with public funds, on behalf of candidates endorsed by defendant partisan political organizations and officials and in opposition to independent candidates such as plaintiff Shakman. These practices deprive plaintiffs of rights under the First, Fifth and Fourteenth Amendments to the United States Constitution and under Sections 1983, 1985, 1986 and 1988 of Title 42 of the United States Code [19-23].

The election for Delegate to the Constitutional Convention has passed but, as the Court of Appeals indicated, the abuses described in the complaint are alleged to be of a continuing nature [petition A10].* The complaint seeks a declaratory judgment that the practices complained of are illegal and unconstitutional [33]. Moreover, plaintiff Shakman alleges he intends to be an independent candidate in the future, and plaintiff Lurie alleges he intends to support him in the future. Respondents and many other qualified voters frequently support and vote for independent candidates and intend to do so in the future [28]. The case, as previously stated, is also brought on behalf of classes of present and future candidates and voters as well as taxpayers [24, 28]. See *Brockington* v. *Rhodes*, 396 U. S. 41 (1969).

The complaint asks basically for preliminary and permanent injunctive relief prohibiting the conditioning of such public employment on public employees' political support (including work and money) of the defendant political organizations or of their candidates. Injunctive relief is also asked to prohibit defendants from discharging, demoting or otherwise punishing public employees in their public employment (or threatening to do so) for such employees' political beliefs or lawful political conduct. It is also sought to prohibit defendant public officials from allowing public employees to do partisan political work on public time. As previously indicated, the complaint further seeks a declaratory judgment declaring such practices illegal and unconstitutional. Plaintiffs also request money damages and other necessary relief [33-37].

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* In fact, respondent Shakman lost the election by 623 votes, out of more than 47,000 votes cast. This fact was presented to the Court of Appeals [Reply Brief 3]. Thus Shakman was defeated by a number of votes less than the probable number of public employees in the electoral district whose public employment was alleged to be conditioned on political support of Shakman's opponent [Reply Brief 3].

The District Court's Opinion.

The District Court dismissed the complaint on two grounds: the complaint was said to be "conclusory" and the plaintiffs were said to lack standing to contest the public employment practices alleged in the complaint. These two grounds were unanimously reversed by the Court of Appeals. *Neither of these grounds is presented for review by this Court.*

The Court of Appeals' Opinion.

The Court of Appeals found that the allegations of the complaint properly stated claims under the civil rights laws and the Constitution. The Court stated that, "The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection. . . . The equal protection clause secures from invidious official discrimination the voter's interest in a voice in government of equal effectiveness with other voters." On the basis of these principles the Court of Appeals held that the Constitution prohibited "the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs," as alleged in the complaint. [petition A14.]

The Court of Appeals further held that the alleged public employment practices imposed unconstitutional conditions on public employment. "Except to the extent some statute validly restricts political expression or activity by public employees, such individuals enjoy the same right of political association and expression, on their on time, as anyone else." [petition A15.] The Court of Appeals ordered the cause remanded for further proceedings.

ARGUMENT.

Respondents respectfully submit that a writ of certiorari should not be issued because the case is not ripe for review. Respondents further submit that the arguments given by petitioners why this case should be reviewed are based on misstatements of the nature of the case and on a failure to consider the clear preexisting law.

I. THE CASE IS NOT RIPE FOR REVIEW.

The decision of the Court of Appeals which petitioners would have this Court review is not a final judgment. Rather, it reversed the dismissal of the complaint and remanded the case to the District Court for further proceedings. No injunctive or other relief has yet been granted. As this Court has indicated, normally such non-final judgments will not be reviewed. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R. R. Co.*, 389 U. S. 327, 328 (1967), where this Court stated, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court", and *American Construction Co.* v. *Jacksonville R. R. Co.*, 148 U. S. 372, 384 (1893).

Review of the case at this stage, without the benefit of any factual record, would create the possibility of unnecessary or multiple review by this Court.

II. THE DECISION OF THE COURT OF APPEALS IMPOSES NO HATCH ACT RESTRICTIONS ON PUBLIC EMPLOYEES.

The petitioners seek to represent the case as an attempt to impose Hatch Act restrictions on public employees [petition 13]. The truth is just the opposite. Plaintiffs do not

seek to prohibit any public employees from doing any lawful political work for any party or candidate on their own time, and no such prohibition is implied in the Court of Appeals' decision. The decision below would not prohibit public employees from engaging in political activities, as does the Hatch Act. Rather, its effect is just the opposite. It would prohibit the *coercion* of public employees into working for and contributing money to one political party and its candidates and into not working for other candidates, regardless of their own desires. It would thus remove restrictions on political activities of public employees, leaving them free to engage on their own time in whatever lawful political activities they choose, or to engage in none if they so desire.

In their statement of the case, petitioners go so far in seeking to misrepresent the decision below as imposing restrictions on public employees as actually to misstate the Court's language. The petition for a writ of certiorari states (incorrectly) that the decision of the Court of Appeals held "that the Constitution protects Respondents from the use of official power *of* public employees" [petition 8, emphasis supplied]. In fact, the decision holds that the complaint states a claim as to the "misuse of official power *over* public employees" [petition A14, emphasis supplied].

III. THERE IS NO CONFLICT OF DECISIONS.

The decision below is not, as petitioners suggest, inconsistent with *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F. 2d 119 (8th Cir. 1968). In *Irish,* the Eighth Circuit held that it would not interfere with the apportionment of state political party convention seats. *Irish* does not in any way conflict with the decision below. It simply is not in point. The gravamen of the present

complaint concerns not the purely internal workings of a political party, as was involved in *Irish,* but the unconstitutional use by *public* officials of *public* employees and *public* funds.

IV. THE COURT OF APPEALS DID NOT ERR IN RULING THAT THE CASE IS JUSTICIABLE.

Petitioners submit that this Court ought to review the decision below because "the complaint is clearly a non-justiciable political question" [petition 9]. Petitioners make the remarkable assertion that the federal judiciary is prevented from examining the constitutionality of any employment conditions imposed by local governments, however offensive to First Amendment freedoms, because "the hiring and dismissal [of public employees] . . . is in the sole discretion of the executive and is examinable only politically. . . ." [petition 10]. In the papers filed in the Court of Appeals, petitioners' position was stated even more blatantly: "subject to statutory limitation, local governments may adopt the same employment practices as any individual or company." [Party's Petition for Rehearing 4.]

This is, of course, completely wrong. ". . . [T]he state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. . . . We may assume that Rachel Brawner could not constitutionally have been excluded from [employment at] the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—*that she could not have been kept out because she was a Democrat or a Methodist.*" *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 897-898 (1961) (Emphasis supplied).

Contrary to petitioners' assertion, the law, as *Cafeteria*

Workers shows, is settled that states may not make public employment subject to unconstitutional conditions. No federal case has ever held that the "political question" doctrine places such unconstitutional conduct beyond the reach of the federal courts.

In numerous cases this Court has directly considered the constitutionality of state imposed requirements for obtaining or retaining public employment and a number of such cases have held that such requirements involved judicially cognizable violations of constitutional rights. See, for example, *Wieman* v. *Updegraff*, 344 U. S. 183 (1952) [overly broad state loyalty oath], where Mr. Justice Clark, writing for a unanimous Court, stated that while states could establish reasonable conditions on public employment, it would be unconstitutional to "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office," 344 U. S. at 191-92; also *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (school teacher dismissed for letter criticizing school board); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961) (vague loyalty oath); *Shelton* v. *Tucker*, 364 U. S. 479 (1960) (requirement of listing membership in organization); and *Bond* v. *Floyd*, 385 U. S. 116 (1966) (court had jurisdiction to consider constitutionality of failure to seat state legislator).

The decision of the Court of Appeals does not conflict with the decisions of this Court on justiciability. Rather, it is petitioners' novel and dangerous theory that the "political question" doctrine excludes judicial examination of the constitutionality of any state imposed requirements for obtaining and maintaining public employment which is in conflict with the existing decisions.

Petitioners further assert that the case involves a "political question" because the constitutionality of the state practices complained of may be dealt with only by the state

legislature. This point has, however, already been decided by this Court adversely to petitioners' contentions. *Baker* v. *Carr*, 369 U. S. 186, 210 (1962), is quite clear:

> "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"

CONCLUSION.

The decision of the Court of Appeals is totally consistent with and is required by the existing case law. Petitioners have failed to demonstrate any reason why this Court should review the decision below, particularly at this stage of the proceedings. Therefore, respondents submit that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

R. Dickey Hamilton,
Robert Plotkin,
208 South LaSalle Street,
Chicago, Illinois 60603,

C. Richard Johnson,
One First National Plaza,
Suite 4200,
Chicago, Illinois 60670,

Roger R. Fross,
135 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Respondents.

March 26, 1971.